Supreme Court, U.S.
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No.

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

WAFFLE HOUSE, INCORPORATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee's agreement to arbitrate employment-related disputes with an employer bars the Equal Employment Opportunity Commission, as plaintiff in an enforcement action against the employer, from obtaining victim-specific remedies for discrimination against the employee, such as backpay, reinstatement, and damages.

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the district court and court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a) is reported at 193 F.3d 805. The opinions of the district court (App., *infra*, 30a-34a) and of the magistrate judge (App., *infra*, 37a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1999. A petition for rehearing was denied on January 14, 2000 (App., *infra*, 35a-36a). On April 4, 2000, the Chief Justice extended the time within which

to file a petition for a writ of certiorari to and including May 15, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Americans With Disabilities Act of 1990, the Civil Rights Act of 1964, and the Federal Arbitration Act are reproduced in the Appendix, *infra*, 54a-63a.

STATEMENT

Based on a claim filed with the Equal Employment Opportunity Commission (EEOC) by Eric Scott Baker, the EEOC brought this action against respondent in United States District Court for the District of South Carolina, alleging that respondent had engaged in unlawful employment practices against Baker on the basis of disability. Respondent moved to compel arbitration or to dismiss the action under the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, on the ground that Baker had agreed to arbitrate employment-related disputes. The district court denied the motion, finding that Baker and respondent had not entered into an agreement to arbitrate. The court of appeals affirmed the district court's refusal to compel arbitration, concluding (contrary to the view of the district court) that Baker and respondent had agreed to arbitration, but that that agreement did not prevent the EEOC from bringing this public enforcement action. The court also held, however, that, although the EEOC could obtain general injunctive relief, the agreement between Baker and respondent did preclude the EEOC from obtaining other, victim-specific forms of relief, such as backpay, reinstatement, and compensatory and punitive damages. The court of appeals accordingly instructed the

district court to dismiss the claims for those forms of relief.

1. As originally enacted, Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 701, 78 Stat. 253, authorized only a private right of action against employers. See generally *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 325-326 (1980). The EEOC was given the authority to process charges of discrimination and, if possible, to work out conciliation agreements with employers, but it was not authorized to bring suit against an offending employer. *Ibid.* In 1972, Congress amended Title VII to provide the Commission with independent authority to bring suit in court. See 42 U.S.C. 2000e-5(f)(1).

The effect of the 1972 amendment was to create a dual system of private and public enforcement. Before a suit can be brought, a charge must be filed with the EEOC by or on behalf of an aggrieved person or by a Member of the EEOC. The EEOC must investigate the charge. 42 U.S.C. 2000e-5(b). If the EEOC finds reasonable cause to believe that discrimination has occurred, it must attempt to conciliate the charge; if that effort is unsuccessful, the EEOC may choose to bring a public enforcement action in its own name. 42 U.S.C. 2000e-5(b) and 2000e-5(f)(1). An employee may intervene in such a suit, but the employee may not bring a suit in the employee's own name if the EEOC has elected to file its own action. 42 U.S.C. 2000e-5(f)(1). If the EEOC fails to act within certain designated time periods or determines that it will not itself file a suit and so notifies the employee, the employee may bring a private suit under Title VII. 42 U.S.C. 2000e-5(f)(1). The EEOC may intervene in any such action. 42 U.S.C. 2000e-5(f)(1). Whether the action is brought by the EEOC or by an employee, the relief

available includes injunctive relief, as well as backpay, reinstatement, and other equitable relief. 42 U.S.C. 2000e-5(g)(1). See *General Tel.*, 446 U.S. at 324. In 1991, Congress expanded the relief available to "a complaining party" in such an action—defined to include both private plaintiffs and the EEOC, see 42 U.S.C. 1981a(d)(1)(A)—to include limited compensatory and punitive damages. See 42 U.S.C. 1981a(a)(1).

Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, outlaws discrimination in employment on the basis of disability. Title I expressly incorporates "[t]he powers, remedies, and procedures set forth in [Title VII]." 42 U.S.C. 12117(a). That includes the procedures outlined above applicable to enforcement actions brought by the Commission and the equitable relief available under 42 U.S.C. 2000e-5(g). In 1991, at the same time as it enacted 42 U.S.C. 1981a(a)(1), which made damages available to a "complaining party" in a Title VII suit, Congress enacted 42 U.S.C. 1981a(a)(2), which in identical terms made the same forms of damages available to a "complaining party" in an ADA suit. The term "complaining party" was defined for ADA purposes—as for Title VII purposes—to include both private plaintiffs and the EEOC. 42 U.S.C. 1981a(d)(1)(B).

2. This case involves a public enforcement action brought by the EEOC. On June 23, 1994, Eric Scott Baker applied for employment at a Waffle House facility in Columbia, South Carolina. App., *infra*, 2a. The application included a provision stating

> that any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions, or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration.

App., *infra*, 18a n.2. Baker was not hired to work at that facility, however. Instead, he began work on August 10, 1994, at a nearby Waffle House facility in West Columbia, South Carolina, apparently without filling out another job application. *Id.* at 3a.[1]

Baker had a seizure disorder. On August 26, 1994, he had a seizure that lasted approximately 30 seconds just after arriving for work. He went home for the day,

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[1] The facts recited in text are undisputed. There is some dispute about the relationship between Baker's June 23 application for the job at the Columbia facility and his ultimate employment six weeks later at the West Columbia facility. The record contains the following information on that subject:

The EEOC filed a set of standard interrogatories with the complaint in this case, based on the EEOC's initial investigation of this case, reciting that "[t]he Manager [of the Columbia Waffle House] interviewed Baker and hired him to work in another nearby Waffle House * * * in West Columbia." C.A. App. 13. Respondent filed an affidavit from its general counsel stating that "[a]ll prospective Waffle House employees are required to complete and sign a Waffle House employment application prior to being hired," *id.* at 24, and attaching the application completed by Baker at the Columbia Waffle House on June 23, 1994. *Id.* at 26-27.

After respondent moved to compel arbitration, EEOC filed an affidavit by Baker giving a somewhat different account of events. The affidavit stated that "[t]he manager [of the Columbia Waffle House] hired me; however, I subsequently declined the job offer." C.A. App. 29. The affidavit then explained that "[a] few weeks after the job offer, I spoke with [the] manager of another nearby Waffle House * * * in West Columbia, South Carolina, and [the manager there] offered me a job * * *, which I accepted." *Ibid.*

On the basis of this information, the district court concluded that the arbitration clause in the application for the job in Columbia did not govern the job in West Columbia (App., *infra*, 34a); the court of appeals reached the opposite conclusion (*id.* at 5a-7a).

and the manager of the West Columbia facility told him not to report for work because of his disorder. On September 5, 1994, respondent terminated Baker's employment. App., *infra*, 32a.

3. Baker filed a charge with the EEOC, complaining that his discharge violated the ADA. He did not submit a claim for arbitration. On September 9, 1996, the EEOC filed this enforcement action in its own name against respondent, alleging that respondent had engaged in "unlawful employment practices on the basis of disability" and seeking "appropriate relief to Eric Scott Baker, who was adversely affected by such practices." C.A. App. 7. The EEOC sought an injunction barring respondent from employment discrimination on the basis of disability, an order that respondent institute antidiscrimination polices and practices to create opportunities and eradicate the effects of past and present disability discrimination, backpay and reinstatement for Baker, compensation for pecuniary and non-pecuniary losses suffered by Baker, and punitive damages. App., *infra*, 4a.

In response, respondent filed a petition under the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, to compel arbitration and to stay or dismiss the EEOC's enforcement action. The matter was referred to a magistrate judge, who filed a report concluding that Baker had entered into an arbitration agreement with respondent covering the instant claim. The magistrate judge recommended that the motion to dismiss the EEOC's action be denied, but that the motion to compel arbitration be granted and the proceedings in this case be stayed pending arbitration. App., *infra*, 4a-5a, 33a.

The district court disagreed with the magistrate judge's conclusions. Apparently relying on Baker's affidavit, see note 1, *supra*, the court held that "it does

not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate." App., *infra*, 34a. Because there had been no agreement to arbitrate, the court ruled that the motion to dismiss and the motion to compel arbitration should be denied. *Ibid.*

4. Respondent filed an interlocutory appeal pursuant to 9 U.S.C. 16(a)(1). A divided panel of the court of appeals reversed the district court's finding that there had been no agreement to arbitrate, holding that such an agreement had been reached between Baker and respondent. The court noted that there was a conflict in the circuits regarding "whether and to what extent the [EEOC], in prosecuting a suit in its own name, is bound by a private arbitration agreement between the charging party and his employer." App., *infra*, 1a-2a (citing *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998), and *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999)). Addressing that question, the court followed the Second Circuit's decision in *Kidder, Peabody* and held that, although the agreement did not preclude an enforcement action by the EEOC because the EEOC was not a party to the agreement, it did limit the relief available in an EEOC enforcement action. See App., *infra*, 15a.

a. With respect to whether an agreement had been formed, the court relied on the interrogatories filed by the EEOC with the complaint in this case, App., *infra*, 3a; see also note 1, *supra*, and held that "[t]he generic, corporation-wide employment application completed and signed by Baker, and the arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him." App., *infra*, 7a. Accordingly,

the court concluded that "Baker's application, when accepted by Waffle House, did form a binding arbitration agreement between Baker and Waffle House." *Ibid.*

The court then addressed the question of what effect, if any, the agreement between Baker and respondent had on EEOC's enforcement action. App., *infra*, 7a-18a. The court recognized that "[i]n enforcing the federal antidiscrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to 'advance the public interest in preventing and remedying employment discrimination.'" *Id.* at 8a (quoting *General Tel.*, 446 U.S. at 331). Referring to the 1972 amendments to Title VII that had vested the EEOC with power to bring enforcement actions in its own name, the court noted that "it was clear that Congress intended by these Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission . . . and not upon private law suits, to achieve equal employment opportunity." App., *infra*, 8a. The court explained that Congress intended "to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public impact." *Id.* at 9a-10a.

The court reached two conclusions. First, the court concluded that respondent "cannot succeed on its motion to compel the EEOC to arbitrate." App., *infra*, 13a. That conclusion was based on the court's recognition "that neither the ADA nor Title VII as incorporated therein requires the EEOC to arbitrate," *id.* at 12a, that "the EEOC is not a party to any arbitration agreement," *ibid.*, and that "the only argument Waffle House could advance to require the EEOC to arbitrate is that the EEOC's interest in enforcing the ADA is derivative of Baker's interest," *ibid.*—an argument that

"disregards the EEOC's independent statutory role," *ibid.* The court also noted that this Court had "recognized implicitly that the EEOC, acting in its public role, is not bound by private arbitration agreements." *Id.* at 13a (citing *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991)).

Second, the court concluded that the charging party's agreement to arbitrate precludes the EEOC from obtaining victim-specific relief—such as backpay, reinstatement, or damages—in an enforcement action. The court noted the federal policy "to give [an arbitration] contract effect in order to favor the arbitration mechanism for dispute resolution." App., *infra*, 14a. In the court's view, "[t]o permit the EEOC to prosecute in court Baker's individual claim * * * would significantly trample this strong policy favoring arbitration." *Ibid.* The court stated that, "[b]ecause Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done himself." *Ibid.* The court concluded that "[t]he EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, but * * * it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims." *Ibid.*

As applied to this case, the court thus held that the EEOC may seek to enjoin respondent from engaging in discriminatory actions and the EEOC may seek an order directing respondent to carry out practices and programs to provide equal employment opportunity and eradicate the effects of past and present discrimination. App., *infra*, 15a-16a. But the court held that the

EEOC "cannot pursue Baker's individual remedies in court," such as "backpay, reinstatement, and compensatory and punitive damages." *Id.* at 17a. Because the EEOC had stated that it had no intention to pursue those remedies in arbitration, the court "d[id] not reach the question of whether the EEOC is authorized to do so." *Ibid.* The court remanded the case "with instructions to the district court to dismiss, without prejudice, the EEOC's claims asserted on behalf of Baker individually and to permit the EEOC to move forward on its claims for broad injunctive relief." *Id.* at 17a-18a. The court did not reach the question "whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks." *Id.* at 18a n.3.

b. Judge King dissented on the ground that Baker and respondent had not entered into an arbitration agreement. He stated that "the district court concluded that Mr. Baker and Waffle House had not made an agreement to arbitrate with respect to the job that [Baker] ultimately accepted—the position of grill operator at the West Columbia Waffle House." App., *infra*, 21a. In his view, that conclusion was based on findings of fact that were not clearly erroneous, *id.* at 22a, and it was supported by the applicable principles of South Carolina contract law, *id.* at 23a-24a.[2] Judge King would consequently have affirmed "the district court's order denying Waffle House's motions to dismiss and compel arbitration, thereby enabling the

[2] We continue to believe, as we argued to the court of appeals, that Judge King's conclusion was correct, and that there was no agreement to arbitrate in this case. Further review of that issue, however, is not warranted, since it concerns the specific facts of this case and issues of state law. Therefore, we assume, for purposes of this petition, that Baker and Waffle House entered into a valid agreement to arbitrate employment-related disputes.

EEOC to pursue injunctive and 'make-whole' relief on behalf of Mr. Baker." *Id.* at 22a.[3] Judge King did not reach the question whether, if there had been a valid arbitration agreement between Baker and respondent, it would have had any effect on this EEOC enforcement action.

5. The court of appeals denied EEOC's petition for rehearing en banc by a 7-4 vote.

[3] Judge King's dissent also noted two additional grounds that could render the arbitration agreement unenforceable, but neither was presented to or discussed by the panel majority, and neither is therefore before the Court on this petition. App., *infra*, 26a-27a n.9. First, he referred to the arbitration agreement's provision that "[t]he costs and expenses of the arbitration shall be borne evenly by the parties." *Id.* at 26a n.9. He explained that several circuits have held that such a provision is unenforceable in similar contexts and may render the agreement to arbitrate itself unenforceable. The EEOC did not raise this issue before the panel, however, and the panel majority did not rule on it. Accordingly, the question whether and under what circumstances arbitration agreements containing similar provisions are enforceable as applied to statutory antidiscrimination claims would not be before the Court on review of this case. For that reason, this case need not be held pending this Court's decision in *Green Tree Financial Corp.—Alabama* v. *Randolph*, cert. granted, 120 S. Ct. 1552 (2000) (No. 99-1235), which presents, *inter alia*, the question whether "an arbitration provision that was 'silent' on the issue of costs and fees was unenforceable under the Federal Arbitration Act because the risk that plaintiff 'might' be required to bear unknown costs and fees potentially undermined her ability to vindicate statutory rights." 99-1235 Pet. at i.

Second, Judge King stated that the arbitration provision in the employment application in this case was "so inconspicuous that it failed, as a matter of law, to provide Mr. Baker with sufficient notice that he was waiving his right to a judicial forum for his statutory claims." App., *infra*, 27a n.9. This question was not presented to or passed on by the panel majority, and it is therefore not before the Court on this petition.

REASONS FOR GRANTING THE PETITION

The court of appeals' ruling holds that the EEOC can be deprived of an important enforcement tool that Congress granted it—victim-specific relief—by an arbitration agreement to which the EEOC never became a party or otherwise assented. That ruling is mistaken and threatens serious harm to the EEOC's enforcement role under federal antidiscrimination statutes. Because arbitration agreements of the sort at issue in this case are increasingly common, the issue can be expected to arise frequently in the future. Moreover, as the court of appeals recognized, its decision in this case—as well as a decision of the Second Circuit in a similar setting— conflicts with a decision of the Sixth Circuit holding that an indistinguishable arbitration agreement has no effect on the ability of the EEOC to obtain all of the forms of relief authorized by Congress, including the precise forms of victim-specific relief barred by the Fourth Circuit in this case. As a result of this conflict, the relief available to the EEOC depends on the circuit in which the case arises. The conflict in the circuits is squarely presented by this case, and further review is therefore warranted.

1. The court below held that by entering into an arbitration agreement with the employer, the employee barred not only himself but also the EEOC from seeking statutory remedies for discrimination in the form of reinstatement, backpay, or compensatory or punitive damages. That holding rests on the view that in seeking those victim-specific forms of relief, the EEOC is largely vindicating private rather than public interests (App., *infra*, 15a), and therefore the EEOC should be circumscribed by the contractual choices made by the private party for whom it acts (*id.* at 16a-17a)—in

particular, the choice to arbitrate, which is favored by the federal policy embodied in the FAA (*id.* at 14a.).

The court of appeals' holding on this point ignores this Court's teaching in *General Telephone* that when the EEOC brings an action to enforce the anti-discrimination law, and even when it seeks backpay and other victim-specific relief, it does not act simply as a proxy for the individual victims of discrimination. In *General Telephone*, the Court rejected the claim that EEOC enforcement actions seeking, *inter alia*, backpay for individual victims of discrimination should be considered "representative actions" subject to Federal Rule of Civil Procedure 23. The Court observed that, when Congress amended Title VII in 1972 to authorize the EEOC to bring enforcement actions, it did not eliminate the right of aggrieved individuals to sue in the absence of EEOC action, and it authorized such individuals to intervene in a suit brought by the EEOC. 446 U.S. at 326. The Court explained that "[t]hese private-action rights suggest that the EEOC is not merely a proxy for the victims of discrimination," and that its enforcement actions therefore should not be considered representative actions subject to Rule 23. *Ibid.* The Court stated that even when the EEOC seeks "specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement.'" *Ibid.* (quoting 118 Cong. Rec. 4941 (1972)). In short, "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Ibid.*

Because the EEOC is not a representative of private parties in litigation, an agreement by a private party to submit disputes to arbitration—or to any other means of resolution—does not commit the EEOC to do the same thing. As the Court recognized in *General Telephone*, Congress granted the EEOC authority independent of a charging party "to bring suit in its own name for the purpose, among others, of securing relief for * * * aggrieved individuals." 446 U.S. at 324. See also *id.* at 324-325 ("straightforward reading of the statute * * * authorize[s] the EEOC to sue in its own name to enforce federal law *by obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act*") (emphasis added). A charging party's agreement to resolve its own disputes by submitting all employment-related claims to arbitration cannot alter the EEOC's statutory authority to sue in federal court and obtain any statutorily authorized remedies there.

Indeed, Congress identified the pre-1972 enforcement scheme, which left enforcement to the choices of private individuals, as a "major flaw in the operation of Title VII." *General Tel.*, 446 U.S. at 325 (quoting S. Rep. No. 415, 92d Cong., 1st Sess. 4 (1971)). As this Court has recognized, victim-specific relief serves a public interest (not merely a private one) by providing "the spur or catalyst which causes employers * * * to endeavor to eliminate, so far as possible, [discriminatory practices]." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). By returning substantial control of that important enforcement tool to private parties, the Fourth Circuit's decision substantially reverses Congress's decision to remedy the "major flaw" in Title VII by giving full—indeed, primary—enforcement authority to the EEOC.

2. a. The decision below deepens an existing split in the circuits. In *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (1999), the Sixth Circuit followed *General Telephone* and held that the EEOC may obtain victim-specific relief in federal court, notwithstanding a private arbitration agreement. In *Frank's Nursery*, the defendant employer required all applicants for jobs to sign a pre-employment agreement providing for compulsory arbitration of all employment claims. *Id.* at 452. An employee who had signed such an agreement filed a charge with the EEOC alleging that the employer bypassed her for promotion on the ground of her race. *Id.* at 453. The employee did not attempt to arbitrate the dispute or otherwise privately settle her claim. *Ibid.*

The EEOC investigated the charge and, after attempts at conciliation with the employer failed, filed suit against the employer in federal district court. *Frank's Nursery*, 177 F.3d at 453. The EEOC sought injunctive relief against the employer, an order requiring the employer to carry out equal employment opportunity policies and eradicate the effects of past and present employment discrimination, and, as in the present case, an order requiring the employer "to 'make whole' [the employee] by providing backpay with prejudgment interest, as well as compensatory damages beyond backpay and punitive damages." *Ibid.* The district court dismissed EEOC's complaint, including its claim for monetary relief, because of the existence of the employee's arbitration agreement. *Id.* at 454.

The Sixth Circuit held that "the district court erred in dismissing the EEOC's claim for monetary relief on behalf of [the employee] by relying on * * * the FAA." 177 F.3d at 459. Quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 625-

626 (1985), the court noted that the FAA "as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements." 177 F.3d at 459. Applying "general principles of contract law," the court reasoned that "one individual cannot contractually waive the statutory rights of one who is not a party to the contract, and one individual cannot, by waiving her statutory right to vindicate her own interest, waive the statutory right of a federal sovereign to vindicate the public interest unless the government agrees." *Id.* at 460. Therefore, since the EEOC "never agreed to arbitrate and is not bound by [the employee's] agreement to arbitrate," *id.* at 461, the private arbitration agreement does not "override the broad powers of the EEOC to obtain monetary remedies for violations of Title VII," *id.* at 459.

The court below acknowledged that its decision conflicts with the Sixth Circuit's decision in *Frank's Nursery*. See App., *infra*, 15a. In both cases, an individual signed a pre-employment agreement to arbitrate, a discrimination dispute arose, and the employee did not seek arbitration. In both cases, the employee exercised the statutory right to file a charge with the EEOC, which investigated the claim and ultimately brought suit for, *inter alia*, victim-specific equitable relief and damages. But, while the Sixth Circuit in *Frank's Nursery* held that the private agreement to arbitrate had no effect on the EEOC suit, including its request for victim-specific relief, the Fourth Circuit in this case held that the private agreement to arbitrate precluded the EEOC from seeking such victim-specific relief in federal court.[4]

[4] The Fourth Circuit also relied on decisions in which a charging party litigated or settled that party's own discrimination claims and the EEOC also brought an action based on the same incident. See App., *infra*, 17a (citing *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990)); see also *Merrill Lynch, Pierce, Fenner and Smith, Inc.* v. *Nixon*, No. 99-2635, 2000 WL 433245 (8th Cir. Apr. 24, 2000) (state agency). Those cases are inapposite, because they raise issues of res judicata and mootness not present in this case. Cf. *General Tel.*, 446 U.S. at 333 ("It * * * goes without saying that the courts can and should preclude double recovery by an individual."). In this case, Baker took no action that is inconsistent with his entitlement to the full relief sought by the EEOC in this action. Even if he chose arbitration as the forum in which to obtain such relief, that choice could not bind the EEOC to choose the same forum.

The fact that *Frank's Nursery* arose from a Title VII race discrimination claim, while this case arises from an ADA claim of discrimination on the basis of disability, is of no consequence. Title I of the ADA—the title governing employment discrimination—expressly incorporates "[t]he powers, remedies, and procedures set forth in [Title VII]." 42 U.S.C. 12117(a). Thus, 42 U.S.C. 2000e-5(g), which provides that a district court may order victim-specific equitable relief such as reinstatement and backpay, is applicable both in Title VII actions and in actions under the ADA. Moreover, the pertinent terms in 42 U.S.C. 1981a(a)(1) that authorize damages in Title VII cases are identical to the terms in 42 U.S.C. 1981a(a)(2) that authorize damages in cases brought under Title I of the ADA.

b. The court below chose instead to follow the reasoning of *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (1998), in which the Second Circuit held that a private arbitration contract barred an EEOC action for damages. *Kidder* held that "an arbitration agreement between an employer and employee precludes the EEOC

from seeking purely monetary relief for the employee under the ADEA in federal court," *id.* at 300-301, although "the EEOC may seek injunctive relief in the federal forum for employees even when those employees have entered into binding arbitration agreements," *id.* at 302. The Second Circuit's decision in *Kidder, Peabody* therefore also appears to conflict with the Sixth Circuit's decision in *Frank's Nursery*, although *Kidder, Peabody* arose in the slightly different context of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* Under the ADEA's enforcement scheme, unlike the scheme applicable to Title VII and the ADA, an employee has no right even to intervene once the EEOC has initiated an enforcement action in its own name. 29 U.S.C. 626(c)(1). That has led some courts to conclude that the EEOC has "representative responsibilities when it seeks private benefits for an individual." *Kidder, Peabody*, 156 F.3d at 302 (quoting *EEOC* v. *United States Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990))—a conclusion with which we disagree, but which could if accepted lead to a different result in ADEA cases.

3. The question presented in this case can be expected to recur frequently in the future. The EEOC filed 439 suits in fiscal year 1999. See http://www.eeoc.gov/stats/litigation.html (May 12, 2000). In most of those cases, it sought victim-specific relief. Under the Fourth Circuit's ruling in this case (and, arguably, the Second Circuit's decision in *Kidder, Peabody*), such relief is not available in cases filed in the States comprising the Second and Fourth Circuits in the increasingly large number of instances in which predispute arbitration agreements are a condition of employment. See *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 199 n.12 (D.

Mass. 1998) (citing studies showing increase in predispute employment arbitration agreements), aff'd, 170 F.3d 1 (1st Cir. 1999). On the other hand, when the EEOC files a similar case in one of the States comprising the Sixth Circuit, victim-specific relief is available under *Frank's Nursery*. Further review is therefore warranted.

4. There is a potential connection between this case and two petitions for certiorari currently pending on this Court's docket—*Circuit City Stores, Inc.* v. *Adams*, No. 99-1379 (filed Feb. 16, 2000), and *Circuit City Stores, Inc.* v. *Ahmed*, No. 99- 1378 (filed Feb. 16, 2000). Each of those cases presents the question whether contracts of employment such as the one in this case are outside the scope of the Federal Arbitration Act, which contains an exclusion for "contracts of employment of seamen, railroad employees, *or any other class of workers engaged in foreign or interstate commerce.*" 9 U.S.C. 1 (emphasis added). In *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.1 (1991), this Court reserved the question whether that exclusion essentially applies to all contracts of employment. The Ninth Circuit has since held that, as a result of the exclusion, "the FAA does not apply to labor or employment contracts." *Craft* v. *Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999). A number of other courts of appeals, however, have held to the contrary. See *id.* at 1086 n.6 (citing cases); App., *infra*, 41a (same).

The question whether the FAA governs the contract in this case is not squarely presented by this petition. In the district court, the EEOC raised the question whether the exclusion applies to this case. See App., *infra*, 41a. By the time the case reached the Fourth Circuit, however, that court had "limited the section 1

exemption to seamen, railroad workers, and other workers actually involved in the interstate transportation of goods." *O'Neil* v. *Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997). Accordingly, the EEOC did not present this issue to the court of appeals, and the court of appeals did not pass on it. It is therefore not before the Court on this petition.

Nonetheless, if this Court were to grant certiorari in either of the *Circuit City* cases and then to rule that employment contracts like the one in this case are not covered by the FAA, it would substantially affect the analysis of the question presented here. The court of appeals' holding that the EEOC could not seek victim-specific relief in this case was based on "the federal policy embodied in the FAA" to "favor the arbitration mechanism for dispute resolution." App., *infra*, 14a. If the FAA does not cover employment agreements like the one in this case, however, such agreements would generally be subject to state law, which may embody different policies.[5] Cf. *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681 (1996) (where arbitration agreement is subject to FAA, state laws restricting arbitration agreements inapplicable). In those circumstances, the applicable state law may well favor or disfavor arbitration, or it may restrict the availability of arbitration in certain circumstances. App., *infra*, 46a (citing provisions of South Carolina law applicable specifically to arbitration agreements). Moreover,

[5] In the absence of the FAA, there is no other federal law that would appear to govern arbitration clauses in individual employment contracts. Cf. *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70, 77-78 & n.1 (1998) (noting "presumption of arbitrability" applicable to collective bargaining agreements under 29 U.S.C. 185).

there would be a substantial question whether state laws that require enforcement of arbitration clauses in employment contracts were sufficient to override Congress's provision of a federal judicial forum for those bringing employment-related claims under the federal antidiscrimination laws.

Depending on the resolution of those issues, both the legal analysis of the question presented in this case (which, in the Fourth Circuit's view, turned on the FAA's policy favoring arbitration) and its practical significance (which would be lessened if federal antidiscrimination claims were not subject to arbitration clauses in employment agreements) could be substantially affected. Accordingly, the Court may wish to hold this petition pending disposition of the *Circuit City* cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 98-1502

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF-APPELLEE

v.

WAFFLE HOUSE, INCORPORATED, DEFENDANT-APPELLANT

Argued March 1, 1999
Decided Oct. 6, 1999

Before NIEMEYER and KING, Circuit Judges, and LEE, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Judge NIEMEYER wrote the opinion, in which Judge LEE joined. Judge KING wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

This appeal presents the question of first impression in this circuit whether and to what extent the Equal Employment Opportunity Commission ("EEOC"), in prosecuting a suit in its own name, is bound by a

private arbitration agreement between the charging party and his employer. Other circuits are split on the proper response to this question. Compare *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (holding that an arbitration agreement between a charging party and an employer precludes the EEOC from seeking purely monetary relief in federal court on behalf of the charging party but not from seeking broad injunctive relief), with *EEOC* v. *Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (holding that a private arbitration agreement does not affect the scope of the EEOC's federal court suit at all).

Recognizing that the EEOC is vested with enforcement authority both to seek broad-based injunctive relief in the public interest and to seek "make-whole" relief on behalf of a charging party, we conclude (1) that the EEOC cannot be compelled, by reason of an arbitration agreement between the charging party and his employer, to arbitrate its claims, but (2) that, to the extent that the EEOC seeks to obtain "make-whole" relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking such relief in a judicial forum. Accordingly, we affirm the district court's decision to deny Waffle House's petition to compel arbitration generally and remand to the district court for consideration of the EEOC's claims in light of this opinion.

I

On June 23, 1994, Eric Baker, who was seeking employment, entered the Waffle House facility located at exit 113 of Interstate 26 in Columbia, South Carolina, and proceeded to fill out and sign an application for employment with Waffle House, Inc. He left blank the

space on the application asking what position he sought. The application included a provision requiring the applicant to submit to binding arbitration "any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment." Although the manager at that Waffle House facility, Lee Motlow, asked Baker whether he wanted the job there, Baker declined and instead, called the manager of a nearby Waffle House facility located at exit 110 of Interstate 26 in West Columbia, to whom Motlow had referred Baker.[6] The West Columbia Waffle House manager interviewed Baker and hired him to begin work two weeks later. Baker did not fill in another application and began work in the West Columbia facility on August 10, 1994, as a grill operator.

At his home, approximately two weeks later, Baker suffered a seizure, ostensibly caused by a change in the medication he was taking to control a seizure disorder that had developed as a result of a 1992 automobile accident. The next day, just after arriving for work, Baker suffered another seizure. Waffle House discharged Baker on September 5, 1994, stating in the separation notice that "We decided that for [Baker's]

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[6] In its answers to interrogatories, the EEOC stated more particularly: "Shortly after he had spoken with Motlow, Baker called the Manager at the Waffle House to which Motlow had referred him. The Manager interviewed Baker and hired him to work in another nearby Waffle House, Unit # 446 in West Columbia. Baker visited Unit # 446 and spoke with the Manager, Mike Bradley. They agreed that Baker would start two weeks later." J.A. at 13.

benefit and safety and Waffle House it would be best he not work any more."

Baker filed a charge with the EEOC, complaining that his discharge violated the Americans With Disabilities Act of 1990 ("ADA"), and on September 9, 1996, the EEOC filed this enforcement action in its own name against Waffle House pursuant to § 107(a) of the ADA, 42 U.S.C. § 12117(a), and § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, alleging that Waffle House had engaged in "unlawful employment practices at its West Columbia, South Carolina, facility." The EEOC stated in its complaint that its purpose for filing the suit was "to correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker, who was adversely affected by such practices." It sought as relief (1) a permanent injunction barring Waffle House from engaging in employment practices that discriminate on the basis of disability; (2) an order that Waffle House institute and carry out antidiscrimination policies, practices, and programs to create opportunities and to eradicate the effects of past and present discrimination on the basis of disability; (3) backpay and reinstatement for Baker; (4) compensation for pecuniary and non-pecuniary losses suffered by Baker; and (5) punitive damages.

In response to the complaint, Waffle House filed a petition under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to compel arbitration and to stay the litigation and, alternatively, to dismiss the action under Federal Rule of Civil Procedure 12(b)(6). The motion was referred to a magistrate judge who—relying on the undisputed record consisting of the complaint, answers to interrogatories, and affidavits filed in connection

with the motion to compel arbitration—recommended to the district court that it conclude that Baker had entered into an arbitration agreement with Waffle House and that the EEOC was required to arbitrate the claims it filed on behalf of Baker. The district court, relying on the facts "extrapolated from the pleadings," disagreed with the magistrate judge's recommendations and denied each of Waffle House's motions, concluding that the arbitration provision contained in Baker's employment application was inapplicable because the West Columbia Waffle House facility, which ultimately hired Baker, had not hired him pursuant to his earlier application submitted at the Columbia Waffle House facility.

Waffle House filed this interlocutory appeal challenging the district court's denial of its petition to compel arbitration and to stay proceedings. *See* 9 U.S.C. § 16(a)(1). On appeal, it argues that (1) contrary to the district court's holding, a valid, enforceable arbitration agreement existed between Baker and Waffle House and (2) its motion to compel arbitration under § 4 of the FAA should be granted because the arbitration agreement between Baker and Waffle House binds the EEOC to "assert Baker's claim in an arbitral forum."

II

Because arbitration is a matter of contract, we must first determine whether an enforceable arbitration agreement governed Baker's employment with Waffle House. *See Johnson* v. *Circuit City Stores, Inc.*, 148 F.3d 373, 377 (4th Cir. 1998). The district court concluded that the arbitration agreement in Baker's employment application did not govern his employment relationship with Waffle House because it was sub-

mitted to the Waffle House facility at exit 113 of Interstate 26 in Columbia, and Baker was not ultimately employed at that facility. When Baker later went to the Waffle House facility at exit 110 of Interstate 26 in West Columbia, he was given a job there without submitting another application. The court thus concluded, "it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate."

We disagree with the district court's analysis because it assumes that the two Waffle House facilities were legally distinct entities in this context. The employment application Baker completed was the standard form application for employment with the corporation Waffle House, Inc., and not with an individual Waffle House facility. Indeed, the manager at the Columbia Waffle House facility referred Baker to the manager at the West Columbia Waffle House facility. In filling out the application, Baker left blank the space provided on the form for listing specific positions applied for, and he specified no intent to limit the application to a particular location. Moreover, when Baker did begin work at the West Columbia facility, he did not fill out another application. It cannot be assumed that a national corporation like Waffle House hired an individual without gathering any of the requisite information, such as his proper name, address, social security number, age and other personal data, qualifications, and references, all of which were contained in the application Baker originally submitted at the Waffle House facility in Columbia.

Accordingly, the fact that Baker was ultimately employed at a different facility than the one at which he was physically present when he completed the application is immaterial to the applicability of the arbitration agreement. The generic, corporation-wide employment application completed and signed by Baker, and the arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him. We thus conclude that Baker's application, when accepted by Waffle House, did form a binding arbitration agreement between Baker and Waffle House.

Having reached that conclusion, however, we must still determine what effect, if any, the binding arbitration agreement between Baker and Waffle House has on the EEOC, which filed this action in its own name both in the public interest and on behalf of Baker.

III

In its motion to compel arbitration, Waffle House sought "to enforce the arbitration agreement between Waffle House and Baker and compel the EEOC, on behalf of Baker, to submit Baker's employment related dispute with Waffle House to arbitration." On appeal, it continues to maintain that "[i]t is of no consequence under the FAA that the EEOC is bringing this action on behalf of Baker rather than Baker bringing this action directly" because the EEOC is "bound by Baker's arbitration agreement with Waffle House." The EEOC characterizes Waffle House's argument as "an astounding proposition." It argues that not only did it "never agree[ ] to arbitrate its statutory claim," but also that the EEOC "has independent statutory authority to bring suit in any federal district court where venue is proper." We agree with the EEOC.

In enforcing the federal antidiscrimination laws, the EEOC does not act merely as a proxy for the charging party but rather seeks to "advance the public interest in preventing and remedying employment discrimination." *General Tel. Co. of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 331, 100 S. Ct. 1698, 64 L.Ed.2d 319 (1980). The EEOC's independent authority to enforce the ADA is clear.

In enacting the ADA, Congress chose to incorporate the enforcement "powers, remedies, and procedures" of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 12117(a) (incorporating by reference 42 U.S.C. §§ 2000e-4, -5, -6, -8, -9). These Title VII mechanisms vest the EEOC with broad authority to enforce, in federal court, the statute's ban on disability-based discrimination. *See* 42 U.S.C. § 2000e-5(f)(1), (f)(3). Under Title VII as originally enacted, the EEOC's powers were limited to investigation and conciliation, and Congress relied exclusively on private parties' suits for enforcement. In 1972, however, seeking to remedy widespread noncompliance under this enforcement system, Congress amended Title VII, according the EEOC the right to file suit in federal court in its own name to eradicate discriminatory employment practices. *See General Tel.*, 446 U.S. at 325-26, 100 S. Ct. 1698. Although the amendments created a dual system of private and government enforcement, we have long recognized that "it was clear that Congress intended by these [1972] Amendments to place primary reliance upon the powers of enforcement to be conferred upon the Commission . . . and not upon private law suits, to achieve equal employment opportunity." *EEOC* v. *General Elec. Co.*, 532 F.2d 359, 373 (4th Cir. 1976) (internal quotation marks and citation omitted).

Because of this public mission, the EEOC cannot be viewed as merely an institutional surrogate for individual victims of discrimination. *See General Tel.*, 446 U.S. at 326, 100 S. Ct. 1698 (holding that "the EEOC's enforcement suits should not be considered representative actions subject to Rule 23"). "[U]nlike the individual charging party, the EEOC [sues] 'to vindicate the public interest' as expressed in the Congressional purpose of eliminating employment discrimination as a national evil rather than for the redress of the strictly private interests of the complaining party." *General Elec.*, 532 F.2d at 373 (quoting *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir. 1975)); *see also EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (concluding that because the EEOC's "interests are broader than those of the individuals injured by discrimination . . . private litigants cannot adequately represent the government's interest in enforcing the prohibitions of federal statutes" (citations omitted)); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (observing that "[p]rivate litigation in which the EEOC is not a party cannot preclude the EEOC from maintaining its own action because private litigants are not vested with the authority to represent the EEOC" (citations omitted)); *EEOC* v. *United Parcel Serv.*, 860 F.2d 372 (10th Cir. 1988); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987).

The statutory structure of Title VII's enforcement remedies (and therefore those of the ADA) reflects the notion that the scope of the public interest exceeds that of the individual's interest. In order to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public

impact, a charging party "may not proceed to federal district court until . . . the EEOC has made its own determination as to the validity of complainant's claim and issued a right-to-sue letter." *Davis* v. *North Carolina Dep't of Correction*, 48 F.3d 134, 138 (4th Cir. 1995). And if the EEOC chooses to file suit, the charging party may not bring his own suit; his right is then limited to intervening in the EEOC's suit. *See* 42 U.S.C. § 2000e-5(f)(1). In a similar vein, when a private individual brings suit, the court may, under certain circumstances, permit the EEOC to intervene to protect the national interest. *See id.* In addition, once the EEOC decides to sue in its own name, it is not limited to the facts presented in the charge. Rather, the EEOC may sue based on "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *General Tel.*, 446 U.S. at 331, 100 S.Ct. 1698; *see also General Elec.*, 532 F.2d at 370. Finally, the EEOC's independent interest is also reflected in the fact that a charging party may not withdraw his charge without the consent of the EEOC. *See* 29 C.F.R. § 1601.10.

Even while empowering the EEOC to sue on a charge independently, Congress preserved the individual's private remedies under Title VII, indicating that private suits are still appropriate to redress individuals' grievances. And even when the EEOC has determined to bring suit in its own name, the charging party retains "the right to intervene in a civil action brought by the Commission" if the individual believes that the EEOC will not adequately represent his interests as it pursues its public objectives. *See* 42 U.S.C. § 2000e-5(f)(1); *compare* 29 U.S.C. § 626(c)(1) (terminating an individual's right to sue under the ADEA upon the EEOC's commencement of an action to enforce that individual's rights).[7] Congress anticipated that the EEOC would not always be able to achieve the best possible result for each individual while at the same time pursuing its mission to vindicate the public interest. *See General Tel.*, 446 U.S. at 331, 100 S. Ct. 1698 (noting that the EEOC "is authorized to . . . obtain the most satisfactory overall relief even though competing interests are involved" and that it must make "the hard choices where conflicts of interest exist").

In short, under the 1972 amendments to Title VII, which are incorporated into the ADA, Congress has created a dual enforcement system, reflecting the notion that the EEOC and the charging party are not interchangeable plaintiffs. Each has its own distinct, albeit overlapping, interests for which overlapping remedies are provided. Thus, in pursuing the inquiry into whether the EEOC can be compelled to arbitrate on the basis of an arbitration agreement binding the charging party, we do not take the EEOC as a surrogate for the charging party, subrogated to his interest. Rather, we examine the related, but independent, interests of both the EEOC and the charging party to determine how an arbitration agreement signed by the charging party affects the prosecution of a claim by the EEOC.

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[7] In concluding that this "distinctive enforcement scheme of the ADEA" illustrates the EEOC's "representative responsibilities when it initiates litigation to enforce an employee's rights," the Third Circuit expressly noted that the enforcement scheme of Title VII "from which the framers of the ADEA consciously departed . . . has no similar feature." *U.S. Steel*, 921 F.2d at 494 & n.4.

First, we must recognize that neither the ADA nor Title VII as incorporated therein requires the EEOC to arbitrate. On the contrary, as demonstrated above, the 1972 amendments to Title VII clearly show that Congress intended that the EEOC vindicate the public interest by conciliation and then by suit in federal court. We must also recognize that in this case the EEOC is not a party to any arbitration agreement. *See AT & T Technologies, Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986); *Arrants* v. *Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (explaining that "[e]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate" (citation omitted)). Thus, the only argument Waffle House could advance to require the EEOC to arbitrate is that the EEOC's interest in enforcing the ADA is derivative of Baker's interest. This argument, however, disregards the EEOC's independent statutory role as we have outlined it.

In addition, contrary to Waffle House's claims, neither of the other two circuits that have addressed the question of the impact of a private arbitration agreement on the EEOC's ability to sue in its own name have concluded that such an agreement permits a court to force the EEOC into arbitration under the FAA. *See Frank's Nursery*, 177 F.3d at 462 (observing that "courts may not treat the agreement of a private party to arbitrate her action as the agreement of the EEOC to arbitrate its action"); *Kidder, Peabody*, 156 F.3d at 301-02 (upholding the district court's grant of the employer's motion to dismiss the EEOC's ADEA suit seeking solely monetary damages but not addressing the issue of compelling the EEOC to arbitrate because the employer did not seek to do so).

Moreover, the Supreme Court has recognized implicitly that the EEOC, acting in its public role, is not bound by private arbitration agreements. *See Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L.Ed.2d 26 (1991) (holding that an employee's private arbitration agreement with her employer precluded *her* from filing suit against the employer under the ADEA). Although a private arbitration agreement does bar an individual ADEA claimant from asserting her claim in court, it does *not* prevent her from filing a charge with the EEOC. *See id.* at 28, 111 S. Ct. 1647. This rule demonstrates the Court's recognition that the EEOC's suit can accomplish aims—namely, combating discrimination on a societal level—that an individual's suit is not equipped, nor perhaps intended, to accomplish. The court also emphasized, in refuting the argument that enforcing arbitration agreements would undercut the statutory scheme, that "it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief." *Id.* at 32, 111 S. Ct. 1647. Thus, it is apparent that the Court did not intend that when an individual who is subject to an arbitration agreement files a charge, the EEOC can only pursue relief in an arbitral forum. To the contrary, the Court appears to have contemplated that arbitration agreements between charging parties and their employers would not infringe on the EEOC's statutory duty to enforce the antidiscrimination laws *in court*.

Accordingly, we conclude that Waffle House cannot succeed on its motion to compel the EEOC to arbitrate.

IV

While we have thus observed that the important role of the EEOC in vindicating the public interest in preventing and eradicating workplace discrimination is not to be restricted by arbitration agreements to which it is not a party, its role in vindicating in federal court the individual interests of the charging party implicates the competing federal policy favoring the enforcement of arbitration agreements.

When an individual and an employer agree to submit employment disputes to arbitration, it is the federal policy to give that contract effect in order to favor the arbitration mechanism for dispute resolution. *See* 9 U.S.C. § 2; *Moses H. Cone Mem'l. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). To permit the EEOC to prosecute in court Baker's individual claim—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample this strong policy favoring arbitration. Because Baker's own suit in court to enforce his ADA claim would be barred by his contract and by the federal policy embodied in the FAA, only a stronger, competing policy could justify allowing the EEOC to do for Baker what Baker could not have done himself. The EEOC's public mission to eradicate and to prevent discrimination may be such a policy in certain contexts, *see Gilmer*, 500 U.S. at 28, 111 S. Ct. 1647, but, as we conclude herein, it cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims. Although the EEOC acts in the public interest, even when enforcing only the charging party's claim, *cf. Albemarle Paper Co.* v.

Moody, 422 U.S. 405, 417-18, 95 S. Ct. 2362, 45 L.Ed.2d 280 (1975), the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief to attack discrimination more generally.

Recognizing these competing policies, we agree with the balance struck by the Second Circuit, which held that although the EEOC "may seek injunctive relief in the federal forum for employees even when those employees have entered into binding arbitration agreements," it may not pursue relief in court—in that case, monetary relief—specific to individuals who have waived their right to a judicial forum by signing an arbitration agreement. *Kidder, Peabody*, 156 F.3d at 302-03; *but see Frank's Nursery*, 177 F.3d at 459-67 (holding that neither the FAA nor principles of preclusion or waiver could operate to bar the EEOC from seeking monetary relief on behalf of aggrieved individuals). When the EEOC seeks "make-whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public, interests. On the other hand, when the EEOC is pursuing large-scale injunctive relief, the balance tips in favor of EEOC enforcement efforts in federal court because the public interest dominates the EEOC's action.

Thus, we hold that to the extent that the EEOC seeks "a permanent injunction enjoining [Waffle House] from discharging individuals and engaging in any other employment practice which discriminates on the basis

of disability" and an order to Waffle House "to institute and carry out policies, practices, and programs which provide equal employment opportunities for qualified individuals with disabilities, and which eradicate the effects of its past and present unlawful employment practices," the EEOC is pursuing the public interest in a discrimination-free workplace, and it must be allowed to do so in federal court, as authorized by the ADA, notwithstanding the charging party's agreement to arbitrate. In seeking to "vindicate rights belonging to the United States as sovereign," *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987) (internal quotation marks and citation omitted), which are not necessarily identical to the interests of the individual charging party, the EEOC's course of conduct should not be affected by the actions of an individual in entering into a private arbitration agreement. *See* Part III, *supra*. In similar contexts where charging parties have been deprived of their right to sue either by settling their claims or having their claims dismissed, courts have nevertheless permitted the EEOC to maintain a suit for injunctive relief. *See, e.g.*, *EEOC* v. *Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1253 (11th Cir. 1997) (noting that "there would be little point in [the EEOC] having the independent power to sue if it could not obtain relief beyond that fashioned for the individual claimant"); *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1291-92 (7th Cir. 1993); *Goodyear Aerospace*, 813 F.2d at 1542-45.

Conversely, however, in these same contexts some of the same courts have recognized that a charging party's actions that impede his own right to sue *can* also circumscribe the contours of the EEOC's suit in its own name to the extent that it acts on behalf of the charging

party. *See, e.g.*, *Goodyear Aerospace*, 813 F.2d at 1543 (holding that the charging party's acceptance of a personal settlement of her claims rendered moot the EEOC's claims for backpay on her behalf); *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 496 (3d Cir. 1990) (holding that the doctrine of *res judicata* barred the EEOC from seeking "individualized benefits" under the ADEA on behalf of individuals whose own suits were unsuccessful because the EEOC was "in privity" with those individuals); *Harris Chernin*, 10 F.3d at 1291 (following *U.S. Steel's* reasoning with regard to the EEOC's claim for backpay, liquidated damages, and reinstatement for an individual whose suit was dismissed as barred by the statute of limitations).

Similarly, we also hold that when the EEOC enforces the individual rights of Baker by seeking backpay, reinstatement, and compensatory and punitive damages, it must recognize Baker's prior agreement to adjudicate those rights in the arbitral forum. Because the EEOC maintains that it "has no intention" of pursuing a claim in arbitration, we do not reach the question of whether the EEOC is *authorized* to do so. But it cannot pursue Baker's individual remedies in court, although it may seek broad injunctive relief in its public enforcement role.

Accordingly, we affirm the district court's order to the extent that it denied Waffle House's motions to compel the EEOC to arbitrate and to dismiss this action. We reverse its ruling that the EEOC may prosecute Baker's individual claims in court. And we remand with instructions to the district court to dismiss, without prejudice, the EEOC's claims asserted on

behalf of Baker individually and to permit the EEOC to move forward on its claims for broad injunctive relief.[8]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

KING, Circuit Judge, dissenting:

Because I agree with the district court that there was no agreement to arbitrate in this case, I must respectfully dissent. I would, therefore, without reaching the issue of the authority of the EEOC to seek injunctive and "make-whole" relief for Mr. Baker on his ADA claim, simply affirm the decision of the district court.

I.

On June 23, 1994, Mr. Baker completed an employment application at a Waffle House restaurant in Columbia, South Carolina ("Columbia Waffle House" or "CWH").[9] The district court found that the manager of

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[8] Waffle House argues that the EEOC is not entitled to broad injunctive relief because its claim relies exclusively on the incident involving Baker. We leave to the district court the question of whether the EEOC has pled sufficient facts to warrant the equitable relief it seeks. *See* 42 U.S.C. § 2000e-5(g)(1).

[9] The employment application completed by Mr. Baker contains a mandatory arbitration provision, which is comprised of four lines of single-spaced text located at the bottom of the first page of a two-page application. It states in full:

> The parties agree that any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

This provision, printed in seven-point font, occupies merely 5/16 of an inch of a page that is eleven inches long. No other clause in the employment application is printed in as small a font size.

the CWH offered Mr. Baker a job on that occasion, which Mr. Baker did not accept.

Approximately three weeks later, Mr. Baker traveled to a different Waffle House restaurant, one located in West Columbia, South Carolina ("West Columbia Waffle House" or "WCWH"), where, the district court found, Mr. Baker "orally applied for a job and was orally given a job which he accepted." J.A. 137. Mr. Baker did not execute a written employment application at the WCWH. Indeed, there is no evidence that the terms of the employment application that Mr. Baker completed at the CWH were discussed or adopted by Mr. Baker and Mike Bradley, the WCWH manager who hired Mr. Baker. Since there was no evidence on the point, the district court found that it did not appear that the "management [of WCWH] knew of or had the benefit of the application form which Baker had previously signed." J.A. 137-38.

The district court made no findings connecting the WCWH offer to the CWH offer that Baker had rejected.[10] Further, the district court's affirmative rejection of the magistrate judge's findings, *see supra* note 2, is, in itself, a factual finding that requires our deference. The district court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside [on appeal] unless clearly erroneous." Fed.R.Civ.P. 52(a). Findings of fact may be overturned only if we are "left with the definite and firm conviction that a mistake has been committed." *Anderson* v. *City*

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[10] In its written opinion of March 20, 1998, from which this appeal is taken, the district court found and concluded as follows:

> [T]his Court *sua sponte* inquired concerning the existence of evidence that Baker and Waffle House made an agreement to arbitrate with respect to the job he accepted. The facts stated by the Magistrate Judge which are extrapolated from the pleadings do not suggest that an employment agreement came into being following Baker's signing of the application form on June 23, 1994. Baker left the Columbia Waffle House without accepting employment. It does not appear from the statement of facts relied upon by the Magistrate Judge that when Baker went to the West Columbia, South Carolina Waffle House, the management there knew of or had the benefit of the application form which Baker had previously signed. Instead, it appears that Baker orally applied for and was orally given a job which he accepted. That being the case, it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate. For that reason, I am unable to agree with that portion of the Magistrate Judge's conclusions.

J.A. 137-38. Significantly, the district court expressly rejected the magistrate judge's conclusion that Baker "appear[ed] to have assented to be bound by the prior agreement, that if employed he would submit his claim to arbitration," by Baker's subsequent acceptance of employment at the WCWH.

of Bessemer City, N.C., 470 U.S. 564, 573-74, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985).[11] The majority wrongly implies that an appellate court may consider and adopt facts found by a magistrate judge—facts already expressly rejected by the district court—without finding such facts to be clearly erroneous.[12]

Based on its factual findings, the district court concluded that Mr. Baker and Waffle House had not made an agreement to arbitrate with respect to the job that he ultimately accepted—the position of grill operator at the West Columbia Waffle House. Consequently, the district court denied Waffle House's motion to compel arbitration and its motion to dismiss.

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[11] *See also* Fed.R.Civ.P. 52 advisory committee's note (1985) (public interest recognizes the trial court, not the appellate tribunal, as the fact-finder, to promote stability and judicial economy). When a court of appeals actively engages in the fact-finding function, it undermines the legitimacy of the district courts. *Id.*

[12] While the majority asserts that the EEOC interrogatory answers support its factual scenario, *see ante* p. [3a] note 1, these answers are legally irrelevant for at least three reasons: (1) they are invalid because they were not made under oath (as required by Rule 33(b) of the Federal Rules of Civil Procedure); (2) they are signed by counsel only (not by Baker, who had the requisite personal knowledge); and (3) their evidentiary value was repudiated by the EEOC at oral argument. *Bracey* v. *Grenoble*, 494 F.2d 566, 570 n. 7 (3rd Cir. 1974). Accordingly, these answers could not and cannot be properly relied on in this case. *See id.* Most importantly, subsequently filed affidavits (properly sworn) do not contain the information relied upon by the majority, *see* J.A. 12, 28, and that information is contrary to the findings of the district court. *See supra* note 2. As I have noted, the majority has not determined the factual findings of the district court to be clearly erroneous.

The district court's findings of fact are not clearly erroneous, and its conclusion that there was no agreement to arbitrate follows perforce from its findings. Accordingly, I would affirm the district court's order denying Waffle House's motions to dismiss and compel arbitration, thereby enabling the EEOC to pursue injunctive and "make-whole" relief on behalf of Mr. Baker.

II.

A.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, which governs here, represents "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Where there is a valid agreement to arbitrate that covers the matter in dispute, the FAA requires federal courts to stay any ongoing judicial proceedings and compel arbitration. *See Hooters of Am., Inc.* v. *Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (citing the FAA, 9 U.S.C. §§ 3, 4).

But the mandate and policy concerns of the FAA come into play only if the claims at issue are arbitrable in the first instance, and if there is a valid agreement to arbitrate. *See Phillips*, 173 F.3d at 937-38. This court has held that a claim such as Baker's is arbitrable; the ADA does not prohibit arbitration of a claim arising under that statute. *See Austin* v. *Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881 (4th Cir. 1996) ("The language of the [ADA] could not be any more clear in showing Congressional favor towards arbitration."); *see also Phillips*, 173 F.3d at 937. However, the question remains whether Mr. Baker and Waffle House

entered into an agreement to arbitrate that would require Mr. Baker to arbitrate any ADA claim arising from his employment at the WCWH.

Whether a contract to arbitrate exists is "an issue for judicial determination to be decided as a matter of contract." *Johnson* v. *Circuit City Stores*, 148 F.3d 373, 377 (4th Cir. 1998) (citing *AT & T Techs., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 648-49, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986)). In deciding this issue, we should apply "ordinary state-law principles that govern the formation of contracts." *Johnson*, 148 F.3d at 377 (quoting *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)).

South Carolina law supports the district court's conclusion here. In recognition of the fact that Mr. Baker did not accept the offer of employment at the CWH, the district court held that "no employment agreement came into being following Baker's signing of the application form on June 23, 1994." The formation of contracts under South Carolina law "is governed by well-settled principles." *Carolina Amusement Co.* v. *Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 437 S.E.2d 122, 125 (1993).

> Quite simply, [a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. Stated another way, there must be an offer and an acceptance accompanied by valuable consideration.

Id. (internal citations and quotation marks omitted).

When the manager at the Columbia Waffle House offered Mr. Baker a job, the terms of *that* offer included the provisions of the employment application, which Mr. Baker had completed in the restaurant on June 23, 1994, while the restaurant manager was sitting next to him. Those terms were part of the "bargained-for exchange" offered by the manager of the CWH.[13] "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24 (1981); *see also Prescott* v. *Farmers Tel. Coop.*, 335 S. C. 330, 516 S.E.2d 923, 926 (1999). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement*, 437 S.E.2d at 125 (citations omitted). Without an acceptance of an offer, there can be no contract. *Id.*; *see also* Restatement (Second) of Contracts § 35 cmt. c.

Because Mr. Baker declined to accept the job offered on June 23, 1994, by the manager of the CWH, no employment agreement was formed. *Id.* Under settled legal principles, the terms of the rejected offer, including the provisions of the employment application,

[13] Indeed, at the top of the application in large, bold, capital letters, Waffle House states the following requirement:

MUST BE COMPLETED IN THE RESTAURANT

J.A. 26. The choice of the definite article "the" is telling. Which restaurant must the application form be completed in? The answer is obvious—*the* Waffle House restaurant to which the job applicant is applying.

In Mr. Baker's case, he did just what the form required—he completed the employment application in the Columbia Waffle House—the restaurant to which he was applying when he filled out the application.

did not survive the rejection of the offer. Mr. Baker's power of acceptance of *that* offer was terminated by his rejection of it. *See* Restatement (Second) of Contracts §§ 36, 38 (when offeree rejects offer, his power of acceptance is terminated).

When Mr. Baker, three weeks later, traveled to the West Columbia Waffle House and orally applied for a job there, its manager, Mr. Bradley, made Mr. Baker an offer for a job as a grill operator at $5.50 an hour. Mr. Baker accepted Mr. Bradley's offer on the spot. There is no evidence that the provisions of the June 23, 1994 employment application were adopted, or even discussed, as part of the employment agreement that came into being three weeks later at the West Columbia Waffle House. *See Player* v. *Chandler*, 299 S.C. 101, 382 S.E.2d 891, 893 (1989) (a valid and enforceable contract requires "a meeting of the minds between the parties with regard to the essential and material terms of the agreement"). Thus, there is no basis for the majority's conclusion that Mr. Baker agreed to arbitrate claims arising from his employment at the West Columbia Waffle House.[14]

B.

In its opinion, the majority simply relies on its own assumptions about corporate practices, as if those are somehow dispositive of the question whether an agreement to arbitrate has been formed, while ignoring the

[14] It is undisputed that when Mr. Baker spoke with Mr. Bradley about a job at the WCWH, Mr. Bradley mentioned neither arbitration nor anything else about the way disputes were settled between Waffle House and its employees.

district court's factual findings.[15] The majority's holding—that the "generic, corporation-wide employment application completed and signed by Baker, and the arbitration provision it contained, followed Baker to whichever facility of Waffle House hired him," *ante* at [7a]—creates an unprecedented rule that has disturbing implications beyond the injustice done to Mr. Baker.

Under the rule the majority creates today, the terms contained in an employment application submitted to one facility in a restaurant chain, or any other business chain, become binding on the job applicant if she is subsequently hired by another facility in the same chain. In effect, the terms contained in the employment application, including the mandatory arbitration provision, become free-floating, ready to bind the unsuspecting job applicant whenever and wherever she might obtain employment with the same chain. It is not surprising that the majority fails to cite any authority to support its conclusion. As explained above, the majority's holding is untenable under fundamental principles of contract law.[16]

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[15] Indeed, the majority substitutes its assumptions for the district court's findings, and fails to review or analyze the district court's findings for clear error. *See* Section I.

[16] In addition, I believe that even under the majority's theory—that the employment application "followed" Mr. Baker to the West Columbia Waffle House—the arbitration provision would be unenforceable.

First, the arbitration provision mandates that the employee pay one-half of the costs and expenses of arbitration, *see supra* note 1 ("The costs and expenses of the arbitration shall be borne evenly by the parties"). At least three of our sister circuits have held that a mandatory arbitration agreement that requires an employee to pay a portion of the arbitrator's fees is unenforceable under the

The majority's rule has no temporal or geographical limits. For example, suppose a student submits an employment application to a McDonald's in North

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Federal Arbitration Act. *See Shankle* v. *B-G Maintenance Mgmt. of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole* v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). These courts reasoned that if an employer requires an employee to agree to mandatory arbitration as a condition to obtaining or continuing employment, thereby prohibiting the employee from using the judicial forum to vindicate his rights, then the employer must provide an accessible alternative forum. *See, e.g., Shankle*, 163 F.3d at 1235. If an arbitration agreement requires the employee to pay a portion of the arbitrators' fees—which often may amount to thousands of dollars—an accessible forum is, in effect, unavailable, because of the disincentive to arbitrate created by such fees. *Id.* Under these circumstances, an employee like Mr. Baker is unlikely to pursue his statutory claims. *See Cole*, 105 F.3d at 1484 (noting that arbitration fees "are unlike anything that [employee] would have to pay to pursue his statutory claims in court"). As the Tenth Circuit reasoned, "[s]uch a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws." *Shankle*, 163 F.3d at 1235 (citations omitted).

Second, the mandatory arbitration provision would be unenforceable because it is so inconspicuous that it failed, as a matter of law, to provide Mr. Baker with sufficient notice that he was waiving his right to a judicial forum for his statutory claims. *See Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 20-21 (1st Cir. 1999). In *Rosenberg*, the First Circuit interpreted the Supreme Court's decision in *Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L.Ed.2d 361 (1998), and a provision of the 1991 Civil Rights Act (which is also included in the ADA), as requiring that "there be some minimum level of notice to the employee [who is a party to a private arbitration agreement] that statutory claims are subject to arbitration". *Rosenberg*, 170 F.3d at 20-21. With its buried arbitration provision, Waffle House failed, as a matter of law, to provide such "minimum level of notice" to Mr. Baker that he was required to arbitrate his ADA claim. *See Rosenberg*, 170 F.3d at 20.

Carolina, and is offered but declines a position there. Then, months or years later, she seeks and obtains employment at a McDonald's in Maryland without submitting another written employment application. Under the majority's rule, she would be bound by the terms of the employment application submitted earlier in North Carolina.

Moreover, if a job applicant wishes to escape the stranglehold of the "generic, corporation-wide employment application," he must specify *his* "intent to limit the application to a particular location." *Ante* at [6a-7a]. The Waffle House application, however, does not request the applicant to specify which Waffle House locations he is applying for. And the application form itself clearly assumes that the job seeker is applying for a position at *the* restaurant where he obtained and completed the application. Yet the majority would nonetheless require the job applicant—rather than the corporation that drafted the terms of the employment application—to specify his intent, which is not asked for, to limit the application to a particular location. To place such a duty on job applicants is patently unfair and unwarranted.

Common sense tells us that a person who physically goes to the Wal-Mart in Lewisburg, West Virginia, is applying for a job at *that* Wal-Mart, not one in Richmond, Virginia, or Charlotte, North Carolina, absent express negotiations to the contrary. He would not reasonably expect that the employment application submitted to the Lewisburg Wal-Mart would be considered an application to work in Richmond or Charlotte. The majority sets a trap for the unwary job

applicant by the counterintuitive rule that it has created today.

III.

Because I agree with the district court that there was no agreement to arbitrate between Waffle House and Mr. Baker, I would affirm its ruling and permit the EEOC to pursue both injunctive and "make-whole" relief on behalf of Mr. Baker.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA COLUMBIA DIVISION

Civil Action No. 3:96-2739-0

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

v.

WAFFLE HOUSE, INC., DEFENDANT

[Filed: Mar. 23, 1998
Entered: Mar. 24, 1998]

ORDER

This case is before the Court pursuant to a report and recommendation submitted by United States Magistrate Judge Joseph R. McCrorey, to whom it was referred for review under 28 U.S.C. § 636 and this Court's local rules. The plaintiff Equal Employment Opportunity Commission (EEOC) commenced this action against the defendant Waffle House, Inc. pursuant to the Americans with Disability Act (ADA), 42 U.S.C. § 12117(a) and Title VII of the Civil Rights Law of 1964, 42 U.S.C. § 2000e-5(s)(1) and (3) and pursuant to the Civil Rights Act of 1991, 42 U.S.C. § 1981a to correct alleged unlawful employment practices based on disability and to provide appropriate relief to Eric Scott

who, EEOC alleges, was adversely affected by such practice. Defendant Waffle House has filed a motion to dismiss and a petition to stay the proceedings and compel arbitration. Waffle House requests that arbitration be compelled pursuant to § 4 of the Federal Arbitration Act (FAA) 9 U.S.C. § 4 and that, because the claims must be arbitrated that the action be dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Upon review, the Magistrate Judge observes that on June 23, 1994 Baker went to the Waffle House restaurant in Columbia, South Carolina and signed an Application for employment while sitting in a booth in the restaurant with the restaurant manager. At the bottom of the first page of the employment application is the following statement:

> The Parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made.

Baker was offered a job by the manager of the Columbia Waffle House, Inc. which he did not accept.

Approximately three weeks later, Baker sought and was offered employment at the Waffle House Restaurant in West Columbia, South Carolina, which he accepted. On August 26, after he arrived at work but

before beginning work, Baker felt he was going to have a seizure. After sitting down in a back room of the restaurant, he had a seizure which lasted approximately thirty seconds and, thereafter, he went home for the day. When Baker returned to Waffle House, the manager told him he could not return to work because of his seizures. Thereafter, on September 5, 1994, Baker's employment was terminated.

Baker filed a charge of discrimination with the EEOC in which he alleged that his discharge constituted a violation of the ADA. The matter was initially referred to the South Carolina Humans Affair Commission for investigation which thereafter failed to find reasonable cause to conclude that Baker's charge was discriminatory. The matter was then referred back to EEOC for review. After conducting its own investigation, EEOC concluded that there is reasonable cause to believe that Baker's charge violated the ADA.

Following his thorough review and correct statement of applicable legal authorities, the Magistrate Judge observes that, under the FAA, parties can petition federal courts to enforce arbitration agreements and he correctly observes that, in determining whether to compel arbitration or that employment dispute, the court must consider (1) whether the parties have made an agreement to arbitrate; (2) the scope of the agreement; and (3) whether the federal statutory claims are arbitrable. *Mitsubishi* v. *Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985). EEOC argues that Baker did not voluntarily or knowingly agree to arbitrate his ADA claims because (1) Baker never signed a job application pertaining to the job for which he was employed; (2) a reasonable person would not have seen

and understood the arbitration provision; and (3) Baker's bargaining position was substantially inferior to that of Waffle House. Rejecting EEOC's contention that Baker never signed a job application pertaining to the job for which he was employed, the Magistrate Judge concluded that the June 23, 1994 application form which Baker signed at the Columbia Waffle House "appears to be a general job application and did not restrict application to a certain position at Waffle House" and that by subsequently accepting employment at the West Columbia Waffle House, Baker "appears to have assented to be bound by the prior agreement, that if employed he would submit his claim to arbitration." Accordingly, the Magistrate Judge concluded that an arbitration agreement exists between Baker and Waffle House and he recommends that the Waffle House petition to compel arbitration and stay proceedings be granted. He also recommends that Waffle House's motion to dismiss be denied.

EEOC objects to the recommendation upon several grounds which will not at this time be discussed. Instead, this Court has *sua sponte* inquired concerning the existence of evidence that Baker and Waffle House made an agreement to arbitrate with respect to the job that he accepted. The facts stated by the Magistrate Judge which are extrapolated from the pleadings do not suggest that an employment agreement came into being following Baker's signing of the application form on June 23, 1994. Baker left the Columbia Waffle House without accepting employment. It does not appear from the statement of facts relied upon the Magistrate Judge that when Baker went to the West Columbia, South Carolina Waffle House, the management there knew of or had the benefit of the application

form which Baker had previously signed. Instead, it appears that Baker orally applied for and was orally given a job which he accepted. That being the case, it does not appear that Baker's acceptance of employment at the West Columbia Waffle House was made pursuant to the written application which included the agreement to arbitrate. For that reason, I am unable to agree with that portion of the Magistrate Judge's conclusions. Upon consideration, I am of the opinion that the motion to dismiss and the motion to compel arbitration should be and they are hereby DENIED.

IT IS SO ORDERED.

/s/ MATTHEW J. PERRY
MATTHEW J. PERRY
SENIOR UNITED STATES
DISTRICT JUDGE

Columbia, South Carolina,
March 20, 1998

APPENDIX C

UNITED STATES COURT OF APPEALSFOR THE FOURTH CIRCUIT

No. 98-1502
CA-96-2739-3-10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

WAFFLE HOUSE, INC., DEFENDANT-APPELLANT

[Filed: Jan. 14, 2000]

On Petition for Rehearing and Rehearing En Banc

Appellee filed a petition for rehearing and rehearing en banc.

Judge Niemeyer and District Judge Lee voted to deny the petition. Judge King voted to grant the petition for rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc.

Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler voted against rehearing en banc and Judges Murnaghan, Michael, Motz and King voted to hear the case en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. 3:96-2739-10BC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

VS.

WAFFLE HOUSE, INC., DEFENDANT

[FILED: May 9, 1997
ENTERED: May 12, 1997]

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

The plaintiff, Equal Employment Opportunity Commission ("EEOC"), filed its complaint in this court on September 9, 1996. The defendant is Waffle House, Inc. ("Waffle House"). EEOC brings this discrimination action pursuant to Section 107(a) of under [*sic*] the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12117(a), including reference to § § 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e-5(f)(1) and (3) and pursuant to Section 102 of the Civil Rights Act of 1991 ("CRA"), 42 U.S.C. § 1981a. EEOC states that the action was brought to

correct unlawful employment practices on the basis of disability and to provide appropriate relief to Eric Scott Baker ("Baker"), who was adversely affected by such practices. Complaint, at 1-2. On December 2, 1996, Waffle House filed a motion to dismiss and a petition to compel arbitration and stay proceedings. Waffle House requests, pursuant to § 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, that arbitration be compelled in the dispute brought by the EEOC on behalf of Baker and that, because the claims must be arbitrated, the action be dismissed for the failure to state a claim, Fed. R. Civ. P. 12(b)(6), or in the alternative, pursuant to § 3 of the FAA, that the proceedings be stayed pending the outcome of arbitration. Waffle House argues that the plaintiff signed an employment application containing an arbitration agreement covered by the FAA and therefore that Baker's dispute must be submitted to arbitration. On December 22, 1996, EEOC filed a memorandum in opposition to Waffle House's motion (EEOC Opp. Mem.) to dismiss and petition to compel arbitration and stay proceedings, accompanied by affidavits from David R. Treeter, Golphin Hankinson, Joseph Doherty, and Baker. EEOC argues that Waffle House's motion must be denied because: (1) EEOC is not subject to the arbitration provision at issue in this case; (2) claims filed under the Americans with Disabilities Act and the Civil Rights Act of 1991 are not subject to mandatory arbitration; and (3) Eric Scott Baker did not knowingly or voluntarily enter into an agreement to arbitrate claims relating to his employment. Waffle House filed a memorandum in reply to EEOC's opposition memorandum on January 13, 1997. On April 30, 1997, Waffle House filed a supplemental memorandum in support of its motion to dismiss and petition to compel arbitration and stay proceedings.

FACTS

Eric Scott Baker, who was twenty years old at the time of the alleged incidents, is a high school graduate. He has a seizure disorder which is generally controlled by medication. On June 23, 1994, Baker went to a Waffle House in Columbia, South Carolina and completed and signed a Waffle House application for employment. He completed the form while sitting in a booth at the restaurant with the restaurant manager. At the bottom of the first page of the employment application are four lines of small print which read:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made.

Upton Aff., Ex. A. The manager offered Baker a position, which Baker declined. Approximately three weeks later, Baker spoke with Mike Bradley, manager of a Waffle House in West Columbia. Bradley offered Baker the position of grill operator, at a salary of $5.50 an hour. Baker started working for Waffle House on August 10, 1994. On August 26, after Baker arrived at work, but before beginning work he felt that he was going to have a seizure. After sitting down in the back room of the restaurant, he had a seizure that lasted about thirty seconds. He then went home for the day. Baker states that he called Waffle House about his

work schedule and was told that he could not return to work until Bradley returned from vacation the next week. Baker states that when he went back to Waffle House, Bradley told him that he could not return to work because of his seizures. Waffle House discharged Baker on or about September 5, 1994. Baker filed a charge of discrimination with the EEOC in which he alleged that his discharge constituted a violation of the ADA. Baker's charge was initially deferred to the South Carolina Human Affairs Commission ("SCHAC") for investigation. SCHAC ultimately concluded that there did not appear to be reasonable cause to find that Baker's discharge was discriminatory. The matter was then referred to EEOC for review. EEOC conducted its own investigation of Baker's claim, issued its conclusion that there did appear to be reasonable cause to believe that Baker's discharge violated the ADA, and attempted conciliation.

DISCUSSION

1. FAA

The FAA was reenacted and codified in 1947 for the purposes of reversing the "longstanding judicial hostility" to arbitration agreements and placing arbitration agreement[s] on par with other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The primary substantive portion of the FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce[17] to settle by arbitration a controversy thereafter

[17] Waffle House argues, and EEOC does not appear to dispute, that the "involving commerce" provision is satisfied because Waffle House operates a multi-state restaurant chain which is heavily

arising out of such contract or transaction...shall be valid, irrevocable, and enforceable . . ." 9 U.S.C. § 2. The Supreme Court has explained that in general, the FAA establishes a "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983).

EEOC argues that Baker falls into the exception of the FCC that excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (emphasis added). In *Gilmer*, the Supreme Court explicitly declined to decide whether this language excludes from coverage all contracts of employment. *See Gilmer*, 500 U.S. at 25 n. 2. Most courts addressing the issue, however, have read this language very narrowly, applying it only to seamen, railroad workers, and other workers personally engaged in moving goods through interstate commerce, *see e.g., Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971); *Tenney Eng'g Inc. v. United Elec. Radio & Mach. Workers*, 207 F.2d 450, 453 (3d Cir. 1953), although the Third, Sixth, and Ninth Circuits have in dicta cast some doubt on this

involved in interstate commerce for the procurement of its food products, advertising, and other operating services and supplies. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 839 (1995) (involving commerce language satisfied if the transaction remotely involved interstate commerce).

interpretation. *See Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1112 n. 1, 1119-20 (3d Cir. 1993); *Mago* v. *Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934 (9th Cir. 1992); *Willis* v. *Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310-311 (6th Cir. 1991) (explicitly adopting a broad reading of § 1).

The Fourth Circuit alluded to this issue over forty years ago. In *United Electrical, Radio, & Mach. Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954), the Fourth Circuit wrote:

> [T]he arbitration clause in the collective bargaining agreement here does not cover the matter of damages arising out of violation of the no-strike clause and that the provisions of the United States Arbitration Act may not be relied on to stay proceedings in a suit brought on a collective bargaining agreement entered into by workers engaged in interstate commerce as those here were engaged.

Id. at 224. The Court continued, however,

> It appears that the exclusion of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union; and certainly such objection was directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute . . . No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions grafted on them by collective bargaining agreements.

Id. (emphasis added). Thus, it does not appear that *Miller Metal* indicates that the Fourth Circuit would read § 1 of the FAA to exclude broadly all individual employment contracts from FAA coverage. The Supreme Court, in *Gilmer*, which held enforceable an arbitration provision compelling arbitration of an alleged Age Discrimination in Employment Act (ADEA) violation, simply affirmed the result and reasoning reached by the Fourth Circuit in that same case. *See Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990). Further, other Fourth Circuit and District Court opinions support such a view. *See Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) (extending *Gilmer* to the collective bargaining context); *see also Reeves v. Commercial Credit Corp.*, 955 F. Supp. 567, 569 (D.S.C. 1997) (the exclusion contained in 9 U.S.C. § 1 "should be narrowly interpreted to apply only to those employees actually engaged in the transportation industry"); *Rudolph v. Alamo Rent A Car, Inc.*, 952 F. Supp. 311, 314 (E.D. Va. 1997) (holding that the FAA applied to an employment contract, notwithstanding the narrow exclusionary clause contained in 9 U.S.C. § 1); and *Kropfelder v. Snap-On Tools Corp.*, 859 F. Supp. 952, 958 (D. Md. 1994) ("this Court is of the view that the Fourth Circuit would not, as of this date, apply the words used in *Miller Metal* so as to exclude § 1's application in all non-collective bargaining contexts, and would instead apply the views expressed by a majority of courts that as to non-collective bargaining contracts the FAA excludes only those workers involved in the interstate transportation of goods."). Further, in a recent case similar to Baker's, the District Court for the Northern District of Illinois determined that an employment application qualified as a valid contract to ar-

bitrate. *Sheller v. Frank's Nursery & Crafts, Inc.*, 957 F. Supp. 150 (N.D. Ill. 1997).

Under the FAA, parties can petition the federal courts to enforce arbitration agreements. 9 U.S.C. § 4. If the court finds the issue arbitrable, it must stay the claim. 9 U.S.C. § 3; *Cherry v. Wertheim Schroder and Co., Inc.*, 868 F. Supp. 830, 836 (D.S.C. 1994). In determining whether to compel arbitration of an employment dispute, the court must consider: (1) whether the parties have made an agreement to arbitrate; (2) the scope of the agreement; and (3) whether the federal statutory claims are arbitrable. *See Topf v. Warnaco, Inc.*, 942 F. Supp. 762, 765 (D. Conn. 1996) (citing *Genesco, Inc. v. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 844 (2d Cir. 1987); *see also Mitsubishi v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

2. Agreement to Arbitrate

Waffle House argues that the arbitration clause contained in Baker's employment application is a valid agreement to arbitrate. EEOC argues that the arbitration agreement should not be enforced because he did not knowingly and voluntarily enter into an agreement to arbitrate employment claims. EEOC further argues that it should not be subjected to arbitration, because it was not a party to the arbitration provision and because it requests additional relief on behalf of other Waffle House employees.

a. Baker's Arbitration Agreement

EEOC argues that Baker did not voluntarily or knowingly[18] agree to arbitrate his ADA claims because: (1) Baker never signed a job application pertaining to his job, (2) a reasonable person would not have seen and understood the arbitration provision, and (3) Baker's bargaining position was substantially inferior to that of Waffle House. Waffle House contends that the job application which Baker signed did not contain language limiting its effectiveness to a specific job or limited period of time, and that Baker knowingly and voluntarily executed the arbitration agreement.

EEOC cannot show that Baker did not voluntarily or knowingly agree to arbitrate his claims relating to employment on the theory that Baker never signed a job application pertaining to the job he held. Baker completed and signed a Waffle House job application form on June 23, 1994. Baker declined the first position he was offered, but accepted another position with Waffle House and began working for Waffle House on August 10, 1994. The application appears to be a general job application and did not restrict the application to a certain position with Waffle House. Baker did not complete the "job applied for" question. Upton Aff., Ex. A. Further, by accepting employment, Baker appears to have assented to be bound by the prior agreement, that if employed, he would submit his

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[18] The EEOC argues that under South Carolina state law and public policy, as well as under the FAA as interpreted in *Austin* and *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1304 (9th Cir. 1994) *cert. denied*, ____U.S.____, 116 S.Ct. 61 (1995), an arbitration agreement is only valid if it was entered voluntarily and knowingly.

claim to arbitration. EEOC next argues that Baker did not knowingly and voluntarily execute the arbitration agreement because a reasonable person would not have seen and understood the arbitration provision because it did not comply with the notice provisions of the South Carolina Arbitration Act. *See* S.C. Code Ann. § 15-48-10 (providing that a notice that a contract is subject to arbitration under the South Carolina statute must be clearly distinguishable, with the notice typed in underlined capital letters, or prominently stamped on the first page of the contract). The South Carolina Arbitration statute does not have to be met for the provision to be valid in this case because the FAA preempts state statutes in agreements covered by the FAA. *See Doctor's Associates, Inc.* v. *Casarotto*, ____U.S. ____, 116 S. Ct. 1652, 1656 (1996) (courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions); *Soil Remediation Co.* v. *Nu-Way Environmental, Inc.*, 476 S.E.2d 149 (S.C. 1996) (FAA preempts the notice provision of the South Carolina Arbitration Act where the presence of interstate commerce makes the FAA applicable).

Finally, EEOC alleges that the arbitration provision was not valid because Baker did not read the provision, because the provision was not explained to him, and Baker's bargaining position was substantially inferior to that of Waffle House. "Generally applicable contract defenses, such as fraud, duress, or unconscionability may be applied to invalidate arbitration agreements without contravening § 2 [of the FAA]." *Soil Remediation*, 476 S.E.2d at 151. Here, however, EEOC has not alleged that the provision was executed under any of those conditions. Baker is a high school graduate. EEOC has not alleged that he is unable to read and

understand. "One who is capable of reading and understanding but fails to read a contract before signing is bound by the terms thereof." *Sims v. Tyler*, 281 S.E.2d 229, 230 (S.C. 1981). Further, "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Gilmer* 500 U.S. at 32; *see also Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1450 (D. Minn. 1996) (holding that agreement to arbitrate contained in an "agreement of hire" was enforceable; employer's failure to explain provisions of arbitration clause coupled with superior bargaining power it enjoyed as an employer within the marketplace did not invalidate the agreement).

b. EEOC

The EEOC argues that it should not be subjected to arbitration, because it did not sign the employment application and because, although it seeks individual relief for Baker, it requests that the Court enjoin Waffle House from engaging in discriminatory employment practices and order that Waffle House institute and carry out policies, practices, and programs which provide equal employment opportunities and eradicate the effects of its unlawful employment practices. EEOC Opp. Mem. at 5, Complaint, 3-4. EEOC argues that its right of action is independent of Baker's private action right. Waffle House argues that the EEOC has made it clear that it is suing on Baker's behalf and that any issue regarding the availability of injunctive relief could be accommodated by the retention of jurisdiction for the purpose of weighing the need for injunctive relief if the arbitrator determines that Baker was the victim of unlawful discrimination.

EEOC cannot show that it may bring claims on behalf of Baker so that Baker can avoid the arbitration agreement. *See, e.g., EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987) (concluding that an individual's settlement of her personal claims renders those personal claims moot). With regard to Baker's claims, EEOC appears to be bringing suit on Baker's behalf or "standing in his shoes." As noted before, EEOC stated in the complaint that it brings this action to provide relief to Baker and EEOC requests monetary relief for Baker. *See* Complaint at 1, 4. Further the EEOC's response to the interrogatories required by Local rule 7.04 DSC reveal that this action is brought on Baker's behalf.[19] Finally, EEOC does not make any allegations of ADA or CRA violations independent of the action set forth on behalf of Baker.

EEOC does seek additional injunctive relief, however, "to correct unlawful employment practices on

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[19] The EEOC, in response to interrogatory number five, writes:

> The Commission brings this action on behalf of Eric Scott Baker. Based on the information currently available to the Commission, the Commission will seek damages for Mr. Baker as follows:
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> a. back pay in an amount sufficient to compensate Mr. Baker for the period from September 4, 1994, the date that Mr. Baker was terminated, through the date of trial, less amount earned in mitigation;
>
> b. prejudgment interest;
>
> c. compensatory damages for out-of-pocket expenses, emotional distress, mental anguish and loss of self-esteem, in an amount to be determined at the time of trial;
>
> d. punitive damages in an amount to be determined at the time of trial.

the basis of disability." Complaint, at 1. "Arbitration agreements do not preclude EEOC from seeking class-wide and equitable relief." *Gilmer*, 500 U.S. at 212. EEOC has standing, by itself, to challenge ongoing discriminatory practice even if the employee has settled his claims. *See EEOC v. United Parcel Service*, 860 F.2d 372, 375 (10th Cir. 1988). The settlement of an employee's claim "does not moot the EEOC's right of action seeking injunctive relief to protect employees as a class and to deter the employer from discrimination." *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d at 1543. EEOC may have a cause of action, separate from Baker's claims for injunctive relief. Thus, the undersigned concludes that EEOC's claims for injunctive relief should not be dismissed, but rather should be stayed pending the outcome of the arbitration process.

3. Scope of the Agreement

EEOC appears to argue that Baker's ADA claims are not within the scope of the arbitration clause. Waffle House argues that the arbitration agreement clearly identifies the issues subject to arbitration. EEOC argues that the Ninth Circuit found that an arbitration provision that "did not even refer to employment disputes" is invalid, *see Lai*, 42 F.3d 1305, and appears to argue that the arbitration clause must specifically identify the type of dispute covered by the agreement. The arbitration clause in Baker's employment application, however, specifically includes "any dispute or claim concerning applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether

such dispute or claim is arbitrable. . ." Upton Aff., Ex. A.

Here, the scope of the arbitration clause is broad and thus encompasses the ADA and CRA claims. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Cherry*, 868 F. Supp. at 834 (*citing Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 218 (1985); *see also Reese*, 955 F. Supp. at 571.

4. Applicability of Arbitration Policy

EEOC argues that ADA and CRA claims should not be subject to arbitration because Baker did not voluntarily agree to arbitrate these claims. Further, EEOC argues that the arbitration scheme is not sufficient to address the claims.

Statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA. *Gilmer*, 500 U.S. at 26. "By agreeing to arbitrate a statutory claim, a party does not forgo substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi*, 473 U.S. at 628. The FAA reflects a strong federal preference toward enforcing arbitration agreements. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24. The Supreme Court has stated:

> "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." . . . If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes.

Gilmer, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

Although EEOC agrees that both the ADA and the CRA favor alternative dispute resolution, it argues that the legislative history of both statutes makes clear that the alternative dispute resolution must be voluntary and that it is not voluntary in this case. The ADA provides that "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212. The Fourth Circuit, in *Austin* found that mandatory arbitration agreements signed as a condition of employment were appropriate and consistent with both the ADA and the CRA. *Austin*, 78 F.3d at 881 ("The meaning of this [ADA] language is plain–Congress is in favor of arbitration."); *see also McRea v. Drs. Copeland, Hyman & Shackman*, 945 F. Supp. 879 (D. Md. 1996) (holding that arbitration provision in employment contract was enforceable with respect to claims under the Civil Rights Act of 1866 and Title VII of the Civil Rights Act of 1964). A recent amendment to Title VII includes a specific expression of Congressional support for arbitration:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081. Court have consistently found that Title VII claims are arbitrable. *See e.g., Mago*, 956 F.2d at 935 (rejecting argument that Title VII evinces congressional intent to preclude arbitration in the context of privately negotiated employment contracts).

Although EEOC argues that Baker did not voluntarily agree to arbitration, there is not an assertion that Baker could not read or understand, or that the arbitration agreement was the result of fraud, coercion, or duress. The EEOC cannot show such an agreement was not voluntary. *See Austin*, 78 F.2d at 885 (arbitration agreements executed by registered brokers as a condition of employment were sufficiently voluntary to be enforceable).

The EEOC also argues that the arbitration scheme is not sufficient to address Baker's claims because it is not clear what remedies are available in arbitration, strict rules of evidence are not followed, the right to judicial *de novo* trial is lost, and arbitration is financially burdensome. Waffle House argues that the Supreme Court has flatly rejected the EEOC's argument that arbitration is inadequate to address Baker's ADA claim.

The EEOC cannot show that arbitration is inadequate for Baker's claims. The Supreme Court in *Gilmer* rejected arguments that arbitrators would be biased, did not issue written opinions, was inadequate in terms of relief, and provided limited discovery by stating:

> Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to

> would-be complaints," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."
>
> * * * * *
>
> Although those procedures [used in arbitration] might not be as extensive as in the federal courts, by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Gilmer, 500 U.S. at 30-31 (internal citations omitted). Further, "arbitrators do have the power to fashion equitable relief." *Id.* at 32.

CONCLUSION

An arbitration agreement exists between Baker and Waffle House; Baker's claims under the ADA and CRA fall within the scope of the agreement; and the EEOC can show no express Congressional intent to preclude a waiver of judicial remedies for a violation of Baker's rights under the ADA or the CRA. It is, therefore,

RECOMMENDED that Waffle House's motion to dismiss be denied and that, pursuant to 9 U.S.C. § 3, Waffle House's petition to compel arbitration and stay proceedings be granted.

Respectfully Submitted,

/s/ JOSEPH R. McCROREY
JOSEPH R. MCCROREY

May 9, 1997

Columbia, South Carolina

APPENDIX E

1. Section 1981a(1) and (2), (b) and (d) of Title 42 of the United States Code provides:

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

* * * * *

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual .

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party-

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

* * * * *

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means-

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

2. Section 2000e-5 of Title 42 of the United States Code provides in pertinent part:

* * * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure;

appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed

a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involv-

ing a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case.

In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by

the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

3. Section 12117 of Title 42 of the United States Code provides in pertinent part:

Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

4. Title 9 of the United States Code provides:

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any

State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.